Supreme Court, U. S.
FILED
JUL 11 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 19___

No. 77-61

DORTHA LEIGH, Widow and Surviving
Joint Tenant of J. W. Leigh,
Appellant,

VERSUS

THE STATE OF OKLAHOMA ex rel.
THE OKLAHOMA TAX COMMISSION,
Appellee.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

STATEMENT AS TO JURISDICTION

FITZGERALD, HOUSTON & WORTHINGTON
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(405) 372-5815
Attorneys for the Appellant

July, 1977

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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In the
Supreme Court of the United States
OCTOBER TERM, 19___

No. .....

DORTHA LEIGH, Widow and Surviving
Joint Tenant of J. W. Leigh,
Appellant,

VERSUS

THE STATE OF OKLAHOMA ex rel.
THE OKLAHOMA TAX COMMISSION,
Appellee.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

STATEMENT AS TO JURISDICTION

Appellant, Dortha Leigh, submits herewith her statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of Oklahoma in Cause No. 49,128, affirming an order of the Oklahoma Tax Commission. This appeal involves identical questions decided by the state court.

THE OPINION BELOW

The opinion of the Oklahoma Supreme Court has not yet been reported, and probably will not be because the first page of the opinion is stamped "NOT FOR PUBLICATION IN OFFICIAL REPORTER." A copy of the opinion filed in the case No. 49,128 is attached hereto as Appendix A.

JURISDICTION

1. This appeal is from a decision of the Supreme Court of Oklahoma affirming an order of the Oklahoma Tax Commission entered under Title 68 O.S. Supp. 1973, Sec. 807(A)(4) wherein the Oklahoma Tax Commission denied Appellant Dortha Leigh's Protest of Tax Assessment based upon her claim of one-half (½) interest in the gross assets in her deceased husband's estate.

2. The Supreme Court of Oklahoma handed down its opinion on February 15, 1977. Appellant's petition for rehearing was denied on May 2, 1977. Notice of Appeal to this Court was filed by Appellant with the Clerk of the Supreme Court of Oklahoma on May 12, 1977. Copy is attached hereto as Appendix B.

3. The jurisdiction of this Court upon appeal is conferred by 28 U.S.C.A. § 1257(2). Appellant challenges the validity of the order of the Oklahoma Tax Commission, a "statute of a state" within the meaning of that provision, on the ground that, as applied to this Appellant solely because she is a woman, it is repugnant to the Constitution and statutes of the United States, and the decision of the highest court of the state was in favor of its validity, as applied under the policy of the Oklahoma Tax Commission.

4. Cases believed to sustain the jurisdiction of this Court on appeal include *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886); *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); *Califano* v. *Goldfarb*, 430 U.S. ___, 97 S.Ct. 1021, 51 L.Ed.2d 270, 45 U.S.L.W. 4237; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43

L.Ed.2d 514 (1975); *Califano* v. *Webster*, 430 U.S. ___, 97 S.Ct. ___, 51 L.Ed.2d ___, 44 U.S.L.W. 3630; *Kahn* v. *Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1975); *Califano* v. *Abbott*, No. 75-1643, ___ U.S. ___, 97 S.Ct. 1540, ___ L.Ed. 2d ___.

5. A copy of Order No. 62,631 of the Oklahoma Tax Commission and the "statute" involved within the meaning of 28 U.S.C.A. § 1257(2) are attached hereto as Appendix C and Appendix D. A copy of the opinion of the Attorney General of Oklahoma No. 73-321 setting out the policy of administration of the Oklahoma statute by the Oklahoma Tax Commission and holding same discriminatory to women is attached as Appendix E.

QUESTIONS PRESENTED

1. Does the Oklahoma Tax Commission's discrimination between male and female surviving spouses, to the detriment of the female, constitute discriminatory enforcement of a law which results in a denial of equal protection of the law to this Appellant?

2. Is the action of the Oklahoma Tax Commission under Title 68 O.S. Supp. 1973, Sec. 807(A)(4) in disregard of the Attorney General's Opinion unconstitutional in that it is a discriminatory enforcement of a valid law that denies this Appellant equal protection of the law, simply because she's a woman, in violation of her rights under the Fifth and Fourteenth Amendments of the United States Constitution and under Article 2, Section 2 of the Oklahoma Constitution, and Chapter I, Article I, Section 3 of the Charter of the United Nations, a treaty of this country?

STATEMENT OF THE CASE

1. Facts of the Case:

J. W. Leigh, a resident of Payne County, died on December 27, 1973. He and Appellant, Dortha Leigh, had been married for over thirty-nine (39) years. J. W. Leigh was a rancher, farmer, building contractor and combiner. Appellant kept books and worked in all of these enterprises and performed as housewife and mother. She filed her Oklahoma Estate Tax Return on or about June 14, 1974, and attached thereto her sworn affidavit (Appendix F attached hereto) and a copy of Attorney General's Opinion No. 73-321 (Appendix E hereto). She claimed contribution to one-half (½) of the estate which was all acquired during their marriage. The Oklahoma Tax Commission allowed her contribution of only those small amounts of earnings where she worked away from the farm and family business and denied the other claimed contribution.

Appellant protested the additional assessment, submitted the protest on the record, the protest was denied in Order No. 62,631 on November 7, 1975 (Appendix C hereto), Appellant paid the additional assessment of $3,814.91 under protest and filed this appeal.

The only evidence as to Appellant's contribution to the estate she and her husband accumulated is in her sworn affidavit (Appendix F hereto). Under the Oklahoma law, Title 68, O.S. Supp. 1973, Sec. 807(A)(4), such affidavit "... *shall be considered prima facie evidence of adequate proof,*" of the surviving spouse's contribution. The policy of the Oklahoma Tax Commission requiring proof of interest in decedent spouse's estate from a surviving female spouse,

but not from the surviving male spouse is set out in the Attorney General's Opinion (Appendix E), and there is no evidence in the record denying that this is an incorrect statement of the Oklahoma Tax Commission's policy.

2. The Order Here Involved:

By its order of November 7, 1975 (Appendix C), the Oklahoma Tax Commission continued to adhere to its policy of presuming that when the husband died, all jointly owned property was to be included in his estate, but that when the wife died, there was not any such presumption. The order denying Appellant's claim to one-half (½) contribution based upon the *only* evidence before the Oklahoma Tax Commission (Appellant's affidavit—copy attached as Appendix F hereto) violated her constitutional rights and deprived her of $3,814.91 without due process of law.

3. The Appeal in the State Court:

Pursuant to the provisions of Oklahoma statutes, Appellant filed an appeal from the Oklahoma Tax Commission's order in the Supreme Court of Oklahoma. In her Petition in Error, Appellant raised the federal questions here involved, contending that the Oklahoma Tax Commission's order was violative of the provisions of the Federal and Oklahoma Constitutions that provide for equal protection of and the taking of property without due process of law, and was invidiously discriminating against this taxpayer on the basis of her sex as follows:

U. S. Constitution, Amendment V, Amendment XIV;

Oklahoma Constitution, Article 2, Section 2; Article 2, Section 7;

and the opinions of this Court, *Pan American Petroleum Corp.* v. *Board of Tax Roll Corrections of Tulsa County, Oklahoma,* Okl., 510 P.2d 680;

and the United Nations Charter, Chapter 1, Article 1, Section 3.

The Supreme Court of Oklahoma affirmed the Oklahoma Tax Commission's order in the opinion (Appendix A) that missed the point a mile. The opinion did not deal in any way with the unquestioned policy of the Oklahoma Tax Commission in applying the Oklahoma Estate Tax Law differently when the surviving spouse was the woman. And the opinion told the Appellant that Oklahoma *now* had an estate tax law that exempted such jointly owned estates from state estate taxes. The opinion did not tell Appellant how the change in the law two years after Bill Leigh died would be of benefit to her. The state court opinion completely ignores the unchallenged statement in the Attorney General's opinion that the Oklahoma Tax Commission did apply the law differently when the surviving spouse was the wife than it did when the surviving spouse was the husband.

Appellant also finds it hard to believe that the state court could have read her affidavit (Appendix F) when the state court opinion says, "Taxpayer's position is not clearly defined as to whether she relies upon her status as a housewife or her contribution by work done on the family farm," when her affidavit is replete with allegations of work in accordance with the understandings of any child over ten years of age.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1.

THE ORDER, AS APPLIED TO APPELLANT, VIOLATES THE APPELLANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES.

The Oklahoma statute, Section 807, supra, is nondiscriminatory on its face and its mandatory provisions must be applied uniformly. It is obvious that discriminatory enforcement of a valid and constitutional law results in a denial of equal protection of the law as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. The landmark case dealing with discriminatory enforcement of a nondiscriminatory statute is *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886), wherein the Court stated:

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust any legal discrimination between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

We thus arrive at the basic question as to whether discrimination between male and female surviving spouses, to the detriment of the female, constitutes discriminatory enforcement of a law which results in a denial of equal protection to the class discriminated against. The United States Supreme Court has recently spoken on a sexual discrimination matter remarkably akin to that at hand. In the case of *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764,

36 L.Ed.2d 583 (1973), the United States Supreme Court held that denying a servicewoman's application for increased quarter's allowances and medical and dental benefits for her husband as a dependent, because she failed to demonstrate that her husband was dependent on her for more than one-half of his support, which benefits would have been available to a serviceman without regard as to whether his spouse was in fact dependent upon him for any part of her support, unreasonably discriminated on the basis of sex in violation of the Due Process Clause of the Fifth Amendment. The United States Court of Appeals for the Tenth Circuit has also reached the conclusion that classifications based upon sex are inherently suspect and must be subjected to close judicial scrutiny. See *Buckley* v. *Coyle Public School System*, 476 F.2d 92 (1973).

In *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), the United States Supreme Court considered the constitutionality of an Idaho statute providing that, when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred over the female. The Court found this statutory preference for male applicants was unconstitutional. In rejecting the state's contention the Court stated that, "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the (Constitution) . . ." It is thus readily apparent that sexual discrimination, even when based upon state statutes, is inherently wrong under the Equal Protection Clause of the Fifth Amendment to the United States Constitution.

And, it is necessary to determine whether or not a policy requiring a surviving female spouse to furnish proof of interest in decedent spouse's estate, and not requiring such proof of a surviving male spouse, would be constitutional.

There is no rational and logical basis for requiring the female to present proof of interest in property acquired during coverture, and not requiring such proof from the surviving male spouse.

Such a position is, in addition, particularly untenable in view of the fact that the statute with which we are concerned gives it the affirmative duty to require such proof from surviving spouses of either sex, and failure to do so is not only unconstitutional, but contrary to and in dereliction of its statutory duty. The Oklahoma Tax Commission must require adequate proof, uniformly, from the survivor claiming an interest with the decedent in the property constituting the taxable estate irrespective of sex. The Oklahoma Tax Commission may not presume that a surviving husband has an interest in the taxable estate, or presume that the surviving wife has none.

In all fairness to the Oklahoma Supreme Court, Appellant recognizes that that Court did not at the time when that Court decided against her, have the benefit of the March 21, 1977, decision of the U. S. Supreme Court upholding a provision of the Social Security Act that provided for computing the amount of old-age insurance benefits for women that results in higher payments to them than for men.

The case was *Califano* v. *Webster*, 430 U.S. ___, 97 S.Ct. ___, 51 L.Ed.2d ___, 44 U.S.L.W. 3630.

Webster, a New York man who became eligible for benefits in 1974, received monthly payments of $185.70, based on an eighteen-year earnings record. A similarly situated woman would have received $204.00. He brought suit, alleging that the discrimination denied him the equal protection guaranteed by the due process clause of the Fifth Amendment. The district court agreed, holding that the distinction between sexes was irrational and that, in any event, the 1972 amendment, which eliminated the distinction, was to be applied retroactively. 413 F.Supp. 127 (1976).

The United States Supreme Court reversed, saying that the statute "operated directly to compensate women for past economic discrimination." The Supreme Court drew a distinction between legislative classifications as to gender that penalize women, such as those in *Califano* v. *Goldfarb*, 430 U.S. ....., 97 S.Ct. 1021, 51 L.Ed.2d 270, 45 U.S.L.W. 4237, and *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975), and classifications aimed at reducing "disparity in economic condition between men and women caused by the long history of discrimination against women," like those upheld in *Kahn* v. *Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (state property tax exemption for widows but not for widowers), and *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975) (female navy officers entitled to longer service than males before mandatory retirement).

And also on March 21, 1977, the United States Supreme Court affirmed a holding by the Northern District of Ohio that Section 402(c)(1)(C) of the Social Security Act is

unconstitutional. That section requires men who seek old-age benefits through their wives to show that they were supported by their wives. There were no similar provisions for wives of insured males. *Califano* v. *Abbott*, No. 75-1643, ... U.S. ....., 97 S.Ct. 1540, ... L.Ed.2d .....

Under Article III, Section 2 of the United States Constitution "The judicial power shall extend to all Cases in Law and Equity arising under the Constitution, the Laws of the United States, and Treatics made, or which shall be made, . . ."

One such treaty is the Charter of the United Nations. We respectfully direct the Court's attention to CHAPTER I, Article I, Section 3 of that treaty:

> "3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion; and"

The unchallenged statement of the Attorney General of Oklahoma, the state's chief legal officer, as to the policy of the Oklahoma Tax Commission has to be regarded as a factual statement of how the Oklahoma Tax Commission applied the state law as to the Appellant.

It appears that the Federal questions are indeed substantial.

CONCLUSION

The Appellant respectfully suggests that her appeal brings before this Court federal questions under the Constitution and the United Nations Charter that are far-reaching and important as to require the consideration of the Supreme Court of the United States, with briefs on the merits and oral argument for their resolution—just as if the Chief of Police of Stillwater, Oklahoma, would declare that the city's traffic ordinances would only be enforced against Indians.

Respectfully submitted,

FITZGERALD, HOUSTON & WORTHINGTON
By CLEE FITZGERALD
P. O. Box 2
Stillwater, Oklahoma 74074
(405) 372-5815
Attorneys for the Appellant

July, 1977

CERTIFICATE OF MAILING

I certify that on this 8th day of July, 1977, I mailed true and correct copies of the above and foregoing STATEMENT AS TO JURISDICTION to the following listed persons:

Mr. Larry Derryberry
Attorney General of Oklahoma
State Capitol Building
Oklahoma City, Oklahoma 73105

Mr. Donald B. Nevard, General Counsel
Oklahoma Tax Commission
2501 Lincoln Boulevard
Oklahoma City, Oklahoma 73194

and

Clyde E. Fosdyke
F. Karen Grethen
Kevin Murphy, Legal Aid
Oklahoma Tax Commission
2501 Lincoln Boulevard
Oklahoma City, Oklahoma 73194

with postage thereon fully prepaid

CLEE FITZGERALD

APPENDIX A

NOT FOR PUBLICATION IN
OFFICIAL REPORTER

FILED
SUPREME COURT
STATE OF OKLAHOMA
FEB 15 1977
Ross N. Lillard, Jr.
CLERK

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

IN THE MATTER OF THE PROTEST AGAINST ADDITIONAL ESTATE TAXES OF THE ESTATE OF J. W. LEIGH	)	
DORTHA LEIGH, Widow and Surviving Joint Tenant of J. W. Leigh,	)	
Appellant,	)	
v.	)	No. 49,128
THE STATE OF OKLAHOMA ex rel. THE OKLAHOMA TAX COMMISSION,	)	
Appellee.	)	

APPEAL FROM THE OKLAHOMA
TAX COMMISSION

Taxpayer, as surviving joint tenant and widow of deceased, claimed a half interest in the joint tenancy estate through her contribution of labor, effort, and industry as a wife and to the family farm operation so as to reduce the taxable estate for state inheritance tax purposes by that same proportion. Tax Commission assessment based on full

value of joint tenancy estate. 68 O.S.Supp.1973, §807(A)(4). Tax paid under protest. Taxpayer appeals seeking refund.

AFFIRMED

Fitzgerald, Houston & Worthington,
By Clee Fitzgerald,
Stillwater, Oklahoma, For Appellant,

Donald B. Nevard, General Counsel,
Stanley J. Alexander,
Clyde E. Fosdyke,
F. Karen Grethen,
Kevin Murphy, Legal Aide,
Oklahoma Tax Commission,
Oklahoma City, Oklahoma, For Appellee.

LAVENDER, V.C.J.:

J. W. Leigh died December 27, 1973. A timely Oklahoma estate tax return was filed by surviving spouse as the surviving joint tenant. She claimed a half interest in the joint tenancy estate. Her supporting affidavit based this claim on her contribution during the thirty-nine year marriage as a wife and to the family farm operation. 68 O.S. Supp. 1973, §807(A)(4), in effect at the time of death, required inclusion in the gross estate the total value of joint tenancy property. This includes the interest of both the deceased and any other person, except (1) the value of any interest in the property originally belongs to "other persons," or (2) "other persons" acquired from deceased for full consideration in money or money's worth. That money or money's worth is to be contributed from separate funds or properties.

Taxpayer argues the unconstitutionality of §807(A)(4). She adopts the authorities and position of an attorney general's opinion. Att'y. Gen. No. 73-321 (March 21, 1974).

Taxpayer's position is not clearly defined as to whether she relies on her status as a housewife or her contribution by work done on the family farm.

The attorney general's opinion found §807 non-discriminatory on its face. It required the same application of the section to the surviving spouse whether that be the husband or wife. The cited authority in that opinion, and adopted by this taxpayer's brief, goes solely to that issue. Here, that surviving spouse is the wife. Nothing of record in this case shows there would have been a different application if the surviving spouse was the husband. Application of §807(A)(4) to her does not demand a determination of discrimination.

The other conclusions of the attorney general's opinion are not bottomed on cited authority. It would not allow the taxing authority to presume full or a particular part interest in the ownership of the joint tenancy property upon which to base the estate tax. This is not the basis for such a tax. *In re Bass' Estate*, 200 Okl. 14, 190 P.2d 800, 806 (1947) recognized this. It reads:

> " * * * the imposition of estate taxes on the whole estate in property held in joint tenancy does not violate the due process clause, (United States v. Jacobs, 306 U.S. 363, 59 S.Ct. 551, 83 L.Ed. 763). These cases are based upon the fact that by the death of the spouse or joint tenant the survivor acquired new or additional rights—the right of sole ownership, possession and the right to sell the entire property—and that the shifting of these benefits was a proper subject of an excise tax. * * *."

The termination of a joint tenancy by death can be an appropriate occasion for the imposition of a tax. The wisdom both of the tax and of its measurement is for the taxing authority to determine. *United States* v. *Jacobs*, *supra*.

We find §807(A)(4) to be constitutional. There is no showing it has been unconstitutionally applied in a sex-discriminatory manner in this case.

Taxpayer argues two other propositions. She complains the Commission did not follow the attorney general's opinion. Views in this opinion make the point moot. The case here is not one of mandamus or prohibition against the Commission. She contends her affidavit is prima facie evidence. We agree as to the facts therein contained. The Commission does not contest the facts so contained.

The Commission allowed the surviving spouse her contributions of money from funds earned by her during a time when she worked away from the farm and business. The facts contained in the affidavit other than those reflecting the survivor's contributions of money do not meet the conditions for exclusion from the gross estate part of the joint tenancy. Section 807(A)(4), which was in effect at the time of the death of the decedent, was valid and constitutional.

Section 807 as last amended removes from inclusion in the gross estate the value of that interest vesting in the surviving spouse. Laws 1976, c. 266.

Affirmed.

HODGES, C.J. and DAVISON, WILLIAMS, BERRY, BARNES, SIMMS, and DOOLIN, JJ. concur.

APPENDIX B

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAY 12 1977
Ross N. Lillard, Jr.
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE PROTEST AGAINST ADDITIONAL ESTATE TAXES OF THE ESTATE OF J. W. LEIGH	)	
DORTHA LEIGH, Widow and Surviving Joint Tenant of J. W. Leigh, Appellant,	)	
vs.	)	No. 49,128
THE STATE OF OKLAHOMA ex rel. THE OKLAHOMA TAX COMMISSION, Appellee.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1

Notice is hereby given that Dortha Leigh, Widow and Surviving Joint Tenant of J. W. Leigh, Appellant in the above Cause No. 49,128, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Oklahoma, affirming an order of the Corporation Commission of the State of Oklahoma which affirmance was entered in the foregoing action on

February 22, 1977, with Petition for Re-Hearing denied on May 2, 1977.

This appeal is taken pursuant to 28 U.S.C.A. §1257(2).

II

The Clerk will please prepare the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in the record, the following:

All exhibits, pleadings and orders related to the proceedings before the Oklahoma Tax Commission and all the pleadings and orders in the Oklahoma Supreme Court, including briefs.

III

The following questions are presented by the appeal.

1. Whether the estate tax practice of the Oklahoma Tax Commission presuming that all of a married couple's jointly owned property was the contribution of the husband and requiring a surviving wife to prove her separate contributions to property jointly owned with her deceased husband, but making no such requirement of a surviving husband spouse—is discriminatory against this Appellant and violates the Constitution of the United States?

2. Whether the said actions of the Oklahoma Tax Commission under Title 68 O.S.A. 1973, Sec. 807(A)(4) are unconstitutional in that they are a discriminatory enforcement of a valid law that denies this Appellant equal protection of the law, simply because she's a woman, in violation of her rights under the Vth and XIVth Amendments of the United States Constitution and under Article 2, Section 2 of the Oklahoma Constitution, and Chapter I, Article I, Section 3 of the Charter of the United Nations, a treaty of this country?

FITZGERALD, HOUSTON &
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STILLWATER, OK 74074
Phone: (405) 372-5815

s/ By Clee Fitzgerald
CLEE FITZGERALD
Attorneys for Appellant, Dortha Leigh, Widow and Surviving Joint Tenant of J. W. Leigh

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 1977, I served a copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES by certified mail, return receipt requested, on the following:

Donald B. Nevard, General Counsel;
Stanley J. Alexander; Clyde E. Fosdyke;
F. Karen Grethen; and Kevin Murphy, Legal Aide;
Oklahoma Tax Commission
2501 Lincoln Boulevard
Oklahoma City, OK 73194

s/ Clee Fitzgerald
CLEE FITZGERALD

APPENDIX C

FILED
WITH
OKLAHOMA TAX COMMISSION
NOV 7 1975
J. L. MERRILL
SECRETARY
By MARY M. LATHROP
ASSISTANT

BEFORE THE OKLAHOMA TAX COMMISSION

IN THE MATTER OF THE PROTEST
AGAINST ADDITIONAL ESTATE TAXES
OF THE ESTATE OF J. W. LEIGH Case No. 3705

ORDER NO. 62631

NOW, on this 30th day of October, 1975, there comes on for an informal hearing before the Oklahoma Tax Commission the matter of the protest of additional estate taxes in the amount of $3,814.91 in the Estate of J. W. Leigh under an Order Assessing Tax dated the 9th day of October, 1974. After examination of the records and files, and consideration of the said estate tax protest, the Oklahoma Tax Commission finds:

1. That the Oklahoma Tax Commission on the 9th day of October, 1974, issued its Order Assessing Tax in the amount of $3,814.91 against the Estate of J. W. Leigh, whose death occurred on the 27th day of December, 1973.

2. That the Estate Tax Division of the Oklahoma Tax Commission gave notice to the Estate of J. W. Leigh that within thirty (30) days from the date of the Order Assessing Tax, an objection could be filed protesting the same.

3. That on a letter dated the 29th day of October, 1974, a Protest of Assessment was made, wherein the surviving spouse claimed a one-half (½) interest in the gross assets of the deceased's estate.

4. Said protest stated that the taxpayer did not request an oral hearing and that the Oklahoma Tax Commission could proceed without further notice to examine into the merits of the protest and enter an order in accordance with its findings.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Order Assessing Additional Tax in the amount of $3,814.91 be and the same is hereby affirmed.

DATED this 7th day of November, 1975.

SEAL OKLAHOMA TAX COMMISSION

ATTEST:

s/ Mary M. Lathrop
Assistant Secretary

s/ D. M. Berry
Chairman

APPROVED:

s/ Clyde Fitts
Assistant Director,
Estate Tax Division

s/ L. L. Leininger
V[illegible] Chairman

s/ F. Karen Gretken
Attorney

s/ J. L. Merrill
Secretary-[illegible]ember

APPENDIX D

Title 68 O.S. Supp. 1973, 807 (A) (4)

§807—(A) The value of the gross estate, used as a basis for a determintaion of the value of the net estate, shall be determined by including:

* * * * * *

(4) To the extent of the value of any interest of the decedent in any property owned by the decedent and any other person as joint tenants, or tenants by the entirety, including funds or securities deposited with any person, corporation, bank or trust company or held in any safety box kept by the beneficiary or joint survivor, except such part of said property or deposit as may be shown to have originally belonged to such other person and never to have been acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth. A surviving spouse or other person claiming to own an interest with the decedent in any property, real or person, included in the taxable estate of the decedent must support said claim by adequate proof, showing the value of claimant's interest contributed in money or money's worth from separate funds or properties, and provided that a sworn affidavit setting forth the facts supporting such claims shall be considered prima facie evidence of adequate proof.

APPENDIX E

ATTORNEY GENERAL'S OPINION NO. 73-321
MARCH 21, 1974

INQUIRY

1. Pursuant to the provisions of 68 O.S. Supp. 1973, §807, must the Oklahoma Tax Commission require a surviving spouse to furnish proof of interest in the dead spouse's estate, irrespective of the gender of such surviving spouse?

2. May the Oklahoma Tax Commission make any presumptions in determining the interest of a widow, who worked in the family business, in the taxable estate of her deceased husband?

3. May the Oklahoma Tax Commission make any presumptions in determining the interest of a housewife in the taxable estate of her deceased husband?

In answer to the first question, 68 O.S. Supp. 1973, §807 reads in pertinent part as follows:

> "(A) The value of the gross estate, used as a basis for a determination of the value of the net estate, shall be determined by including:
>
> ". . . .
>
> "(4) To the extent of the value of any interest of the decedent in any property owned by the decedent and any other person as joint tenants, or tenants by the entirety, including funds or securities deposited with any person, corporation, bank or trust company or held in any safety box kept by the beneficiary or joint survivor, except such part of said property or deposit as may be shown to have originally belonged to such other person and never to have been acquired by the latter from the decedent for less than an ade-

quate and full consideration in money or money's worth. *A surviving spouse or other person claiming to own an interest with the decedent in any property, real or personal, included in the taxable estate of the decedent must support said claim by adequate proof,* showing the value of claimant's interest contributed in money or money's worth from separate funds or properties, *and provided that a sworn affidavit setting forth the facts supporting such claims shall be considered prima facie evidence of adequate proof.*—(Emphasis added.)

This statute, Section 807, supra, is non-discriminatory on its face and its mandatory provisions must be applied uniformly. It is obvious that discriminatory enforcement of a valid and constitutional law results in a denial of equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution. The landmark case dealing with discriminatory enforcement of a nondiscriminatory statute is *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886), wherein the Court stated:

> "Th*rough* the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust any legal discrimination between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

We thus arrive at the basic question as to whether discrimination between male and female surviving spouses, to the detriment of the female, constitutes discriminatory enforcement of a law which results in a denial of equal protection to the class discriminated against. The United States Supreme Court has recently spoken on a sexual discrimination matter remarkably akin to that at hand. In the case

of *Frontiero* v. *Richardson*, ___ U.S. ___, 36 L. Ed. 2d 583, 93 S. Ct. ___ (1973), the United States Supreme Court held that denying a servicewoman's application for increased quarter's allowances and medical and dental benefits for her husband as a dependent, because she failed to demonstrate that her husband was a dependent on her for more than one-half of his support, which benefits would have been available to a serviceman without regard as to whether his spouse was in fact dependent upon him for any part of her support, unreasonably discriminated on the basis of sex in violation of the Due Process Clause of the Fifth Amendment. The United States Court of Appeals for the Tenth Circuit has also reached the conclusion that classifications based upon sex are inherently suspect and must be subjected to close judicial scrutiny. See *Buckley* v. *Coyle Public School System*, 476 F.2d 92 (1973).

In *Reed* v. *Reed*, 404 U. S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971), the United States Supreme Court considered the constitutionality of an Idaho statute providing that, when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred over the female. The Court found this statutory preference for male applicants was unconstitutional. In rejecting the state's contention the Court stated that, "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the (Constitution) . . . ." It is thus readily apparent that sexual discrimination, even when based upon state statutes, is inherently suspect under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

It thus becomes necessary to determine whether or not a policy requiring a surviving female spouse to furnish proof of interest in decedent spouse's estate, and not requiring such proof of a surviving male spouse, would

survive such close judicial scrutiny. The Oklahoma Tax Commission has apparently attempted to justify its position by reliance upon the fact that Oklahoma is not a community property state. However, in the Oklahoma Supreme Court case of *Collins* v. *Oklahoma Tax Commission*, 446 P.2d 290 (1968), the Court said:

> "Property acquired during married life as a result of industry, economy and business ability is the jointly acquired property subject to the equitable division required under the statute . . . . If property has been acquired by joint effort during marriage the wife has a vested interest therein . . . ."

In *Tobin* v. *Tobin*, 89 Okl. 12, 213 P. 884 (1923), the Oklahoma Supreme Court held that factors to be considered in an equitable division of property involve the fact that joint acquisition of property may be due to the wife's "economy, industry, frugality, and sturdy virtues, which have been a stay to the home and the constant guard of the accumulation . . . ."

Therefore there is no rational and logical basis for requiring the female to present proof of interest in property acquired during coverture, and not requiring such proof from the surviving male spouse. It therefore becomes apparent that a policy requiring only surviving female spouses to furnish proof of interest in the decedent spouse's estate is without rational basis and is an inherently suspect classification which would not withstand close judicial scrutiny.

Such a position is, in addition, particularly untenable in view of the fact that the statute with which we are concerned gives it the affirmative duty to require such proof from surviving spouses of either sex, and failure to do so is not only unconstitutional but contrary to and in dereliction of its statutory duty. The Oklahoma Tax Commission must require adequate proof, uniformly, from the survivor claiming an interest with the decedent in the property con-

stituting the taxable estate irrespective of sex. The Oklahoma Tax Commission may not presume that a surviving husband has an interest in the taxable estate, or presume that the surviving wife has none.

We next consider whether the Oklahoma Tax Commission may presume that one spouse has a specific interest in the family business which makes up the taxable estate of the deceased. This possibility most frequently occurs either with the husband and wife operating a family business or in a family farming operation where both spouses work. In both situations, it is probable that one spouse handled the financial transactions for the business or farming operation. Do the paper transactions necessarily reflect that that particular spouse contributed a certain value to the business or farming operation and therefore to the taxable estate? Further, an absence of one's name on the paper transactions might lead to the presumption that that spouse did not contribute to the family business. Such presumptions are invalid.

As set forth in Question 1 above, the Oklahoma Tax Commission may not engage in a presumption that a surviving spouse had a particular interest in the taxable estate of the decedent. Neither is there a presumption that the spouse who handled the paper transactions for the business or farming operation contributed that amount to the business and therefore to the taxable estate.

It is therefore not constitutionally permissible to presume that the husband produced all or a particular share of the income to the business or farming operation and thereby creating a presumption as to his contribution to a taxable estate. Such presumption would invite one spouse to surreptitiously furnish money to the other for the purpose of establishing a contribution to the taxable estate. The obvious intention of the marital partners must be considered in determining a taxable estate, and there is no

reason to force them to circumvent the law in order to establish their true intentions.

The last question involving a presumption of a housewife's interest in the taxable estate envisions a situation where a husband is employed or self-employed and is the recipient of income that is applied to the family's benefit, and his spouse is a non-income earning housewife.

To analyze the taxable estate under these facts, it is necessary to put the family unit in proper perspective. A husband and wife have an absolute right to determine how their family unit will function. The partners to that marriage may determine whether one or both will seek outside, income-producing employment. In the event both choose to seek employment, it may become necessary to employ others to do housework, yardwork, babysitting, etc. On the other hand, the partners may decide that the husband will seek employment and contribute his income to the family unit and his wife will contribute by being a mother and housewife. It is that freedom of choice to arrange one's life that must be affirmatively considered in this constitutional question.

In the event the partners decide that the husband should be employed while the wife remains in the home, it is obvious that both activities comprise a combined effort and industry, through a mutual decision on the part of both marriage partners, to create a marital community, and thus, a taxable estate.

It necessarily follows that a housewife must be allowed to establish her interest in that estate by virtue of her service and labor within the house. As a general rule such widow who has been a lifelong housewife is least prepared to earn a substantial living after her spouse's death and is least able to pay the costs of the unfair taxation.

Therefore, it is a constitutional consequence that a housewife's labor, effort and industry in the house is a contribution to the value of the material accumulations of the family, and, therefore, the taxable estate. The contribution of such surviving spouse may be established through proper proof to the Oklahoma Tax Commission.

It is, therefore, the opinion of the Attorney General that the first question be answered as follows: The Oklahoma Tax Commission may not require a surviving female spouse to furnish proof of interest in the decedent's taxable estate, while not requiring such proof by a surviving male spouse. Under 68 O.S. Supp. 1973, §807, the Oklahoma Tax Commission must require adequate proof, uniformly, from the survivor claiming an interest with the decedent in the property constituting the taxable estate irrespective of sex.

It is the opinion of the Attorney General that the second question be answered as follows: When both spouses work in a family business or farming operation, the Oklahoma Tax Commission may not presume that either spouse contributed the business income to the family taxable estate. The surviving spouse may offer proof of contribution to the taxable estate by showing joint income-producing industry.

It is the opinion of the Attorney General that the third question is answered as follows: Section 807 (4) of Title 68 of the Oklahoma Statutes does not preclude a surviving spouse who is a housewife from claiming an interest in the taxable estate. Such surviving spouse has a constitutional right to claim and offer proof that her labor, effort and industry in the home is a contribution to the value of the material accumulations of the family, and, therefore, the taxable estate. The Oklahoma Tax Commission may not presume that such housewife made no contribution to the decedent's taxable estate.

This opinion does no preclude subsequent legislative enactment to clarify or change the statutory provisions relating to estate taxes. Neither should this opinion be

construed to create a presumption of equal participation in the taxable estate, but rather requires the Oklahoma Tax Commission to consider that contribution of money's worth may be established by a spouse working in a family business or farm operation and by a housewife. In that way, the contribution of both spouses may be recognized regardless of how the individual parties may have chosen to arrange their family unit in terms of labor, effort and acquisition.

APPENDIX F

AFFIDAVIT

STATE OF OKLAHOMA)
) SS:
COUNTY OF PAYNE)

DORTHA E. LEIGH, of legal age, being first duly sworn upon her oath, states and alleges:

In the more than thirty-nine years of our married life, I feel that I have made a real contribution to the accumulation of our estate with my homemaking skills, with well-kept records, by working many hours in the yard and garden, by sharing in the care of livestock, by co-operating in every possible way to facilitate the carrying on of work, both on and off the farm, and by assuming full responsibility of the livestock and farm for the many months when my late husband was away at harvest.

I came into our marriage with an educational background that included a high school education, with all the home economics courses that were offered, also bookkeeping, and more than the required mathematics courses. I had spent 8 years in 4-H Club. I became proficient enough to can a collection of food products that won first in its class at the State Fair in 1932 and to prepare a collection of garden seed that won first in state in 1930. My knowledge of correct methods was such that I won second in canning judging in 1932 and in 1933 I won first in clothing judging and third in judging baked products at state level. I gave many demonstrations on food preparation and service at state fairs and contests. I won reserve champion in the County appropriate dress contest in a dress that I made. I won a trip to Chicago on my outstanding 4-H record.

I enrolled in the school of Home Economics at Oklahoma State University and attended briefly. At enrollment

time I took the examination and was allowed to enroll in advanced clothing rather than the freshman course. I believe that this exceptional background in Home Economics helped me a great deal in food preparation, home management, gardening, canning, and sewing for my family. This sewing included all my own clothes, shirts, shorts, and pajamas for my husband and son, also curtains, drapes, and other household items (renovation of suit).

My interest in extension work has never stopped. I participated in our adult Home Extension group for several years. I served as president and secretary of our club, secretary of our County Council, and on the state Auditing Committee. I took advantage of tailoring, upholstering, furniture refinishing, home nursing courses, and workshops offered in the county. I also completed a course for nurses aides and one in first aid offered by the Red Cross. Many times in the years that I have lived near Stillwater I have attended the annual Extension Homemakers Conference held at Oklahoma State University. Here we have the opportunity to hear specialists and outstanding speakers from over the entire United States. I felt that by constantly trying to improve my knowledge of new products, techniques, and related subjects I could give my family a better home life and make a greater material contribution.

When I was first married (October 17, 1934) I did housecleaning and babysitting for a doctor and his family. My husband enrolled in the Civilian Conservation Corp. January 4, 1935. He later moved to Guthrie. I believe at this time he was drawing $25.00 a month. I obtained employment for a short time in the state Bankhead Office and was making $3.00 per day. My late husband then obtained a discharge from the C.C. Corp. and came back to Stillwater. He was employed in a filling station and I worked for F. W. Woolworth. I think at this time he was making $30.00 a month and I was making $10.00 a week. We continued this work until June, 1936, when he went to work

for Skelly Oil Co. in Kansas for the summer. Then in the fall he went to work for Shell Oil Co. in the production department. He followed this work until late in 1941. We grew tired of the constant moving and the living conditions and moved to the farm. At first we rented a farm; then later in 1942 we bought the rights on a school lease. For a short time he worked on an oil drilling rig nearby. I milked the cows in the evening, and cared for the livestock that included beef cattle, sows, pigs, and fattening hogs. For about seven years we continued to farm and to raise cattle and hogs. My late husband did custom hay baling.

During the winter months I helped with the milking, but in the farming season a great deal of the time I did the evening chores that included milking by hand 7 or 8 cows. In hot weather I carried as many as 13 buckets of water a great distance to hogs to keep them from dying from the heat. There was no running water at that time. The care of the hatchery flock of chickens was exclusively mine, including cleaning the chicken house. By culling and meeting other requirements I maintained an approved breeding flock and so received a premium above local market price for eggs produced. This premium meant extra cash for groceries. The feed that I purchased for this flock came in cotton bags. We all had garments that I constructed from these sacks in addition to the pillow cases, curtains, and many other things I made from them. I hauled home-cooked meals to the hay crew and ran countless errands for parts and supplies. The meals that I carried to the hay crews and in later years, the combine crew, were not just sandwiches and soda pop but substantial meals. I can recall trying to get to the field with meringue cream pies without complete disaster. Believe me, it is much easier to prepare a meal and put it on the table than to have to carry it to a car and drive to some distant field with it. I can recall too, seating nineteen men in my dining room at one time for dinner at threshing time. A lot of the food served was produced on

our farm. The food was of good quality and was less expensive but the hours spent in preparation are considerably more when you dress the chickens and go to the garden and pick the vegetables, wash, and prepare them. Sometimes I picked berries, cherries and other fruit on the shares and then brought mine home and canned it. We also helped a neighbor to make sorghum and received sorghum in return for our help. I picked up pecans too, generally for our own use but one fall in particular I remember that we worked several days picking up pecans, then selling our part to help on our living expenses. In the last thirty years I doubt if there's been a time that I didn't have jelly or canned juice to make jelly from sand plums that I picked and prepared. For many years I canned large quantities of vegetables, made pickles, jams, and jellies. I canned beef stew, broth and made mincemeat at butchering time. I helped with the curing of the pork and I rendered the lard. Home-churned butter and cottage cheese that I made were many times on our table. This was our way of life for several years.

In April, 1947 we went to an auction of two quarter sections of land. We had been looking for some deeded land to buy, but had not looked over this par'icular land. It was a spur of the moment decision, when we bought the quarter section that was to be our home for twenty-five years. My late husband and his brother had previously made plans to leave the next morning for Southeastern Oklahoma and Texas to buy cattle so it was up to me to go to the Federal Land Bank to ask for a loan to finance our future home.

The farm that we purchased had three old buildings on it. These buildings were an old barn, a house, and an old smokehouse. We moved the old house, raised it and sawed off the lower part, set it on blocks, and ran concrete in it to make a milking barn. I drove the tractor as we pulled the building to the new location. We bought a single hutment and a double hutment that had been used by the

government. We used the single one for a milk house, setting it up and equipping it to produce Grade A milk. The other one we made into a temporary home by adding partitions, panelling the walls, installing plumbing, etc. We spent weeks in making these improvements and I helped constantly. Our son was 14 months old at the time we started, but even so we all came to the new place together and went back at night. A friend whose home we passed remarked that we came by her place before they got up and went back home after they went to bed. That may have been an exaggeration but we put in some long hours getting ready to move to our new place. Late that summer we moved and started producing and selling Grade A milk. Soon the milking was done by machine and then I washed milking equipment and helped keep the milkhouse ready for inspection.

In December, 1948 my late husband joined his brother in the construction of homes. He was in this partnership for over two years, during this time we built a new home in Stillwater and moved into it. During this time I did the bookkeeping which included a payroll of as many as thirty-two employees, a separate record of the man hours spent in different types of labor for workman's compensation, the monthly, quarterly and annual government reports for F.I.C.A. and unemployment compensation, and W-2 statements at the years end. Also hospitalization insurance.

In March, 1951 we sold our home and moved back to the farm, leaving this phase of the construction business. We moved into the single hutment that we had used for a milk house, moved the double hutment to be used for storage and a garage, and started to build our present home. That 16'x16' hutment was crammed with furniture, but served for living quarters, and I also cooked dinner here for the neighbor boy that helped parttime in the construction of our new home. I helped too, with the building of this home, and did much of the sanding, painting, and varnishing. We moved into this home long before completion

and finished it as time and finances permitted. It was actually not completed for several years. In the years that followed, my late husband worked on jobs off the farm a great deal. For a short time he worked again in the oil field. He worked as far away as 50 miles and with driving time in addition to an 8 hour shift, he would be away from the farm as much as 11 hours, seven days a week, leaving the care of the livestock and other farm chores to me during this time.

Soon after we moved into our new home, I started to improve our yard. I enrolled in the extension yard improvement contest and placed high in the district contest. I spent many hours doing yard work, and although I have not stayed with the original formal yard plan, I feel that I have a yard that adds much to the beauty and value of our home. Through the years we have received many compliments on the yard and I feel that in this manner I have made a major contribution toward the value of our home.

In June, 1953 we bought a combine and my husband started doing more custom work. He did this for several summers locally and then in 1958 he started following the harvest north. A few years he went south to Minco, Oklahoma to start and as far north as Hay Springs, Nebraska. One year they went into Wyoming and harvested wheat grass seed. This meant that he was away from home for several months at a time. During these months I had the entire responsibility of the farm and livestock. Always we had cattle, for several years we had hogs that had to be fed out for market, and a few years we had 115 ewes with their lambs. In the extreme hot weather some of the older ewes would die and I'd have to load them on a sled and pull them behind a pickup to a canyon on the backside of the farm. During these months it wasn't unusual for the cattle to get out and there would be other problems. The water system had to be repaired after an electrical storm one year.

During the months of the year that he wasn't running a combine, my late husband worked at many other jobs off the farm. For a part of two years he was employed by Payne County Implement Co. He did carpenter work, he worked for several months selling insurance, and for some two years he worked in the maintenance department of the Student Union at Oklahoma State University. While he was selling insurance he was gone most of the time for the entire week and would spend only the weekends at home. Again it was up to me to keep things going at home.

During all of our married life, I kept all records, paid a majority of our bills with checks by mail, and much of our banking I did by mail. I prepared the necessary information for the accountant at income tax time. Since, for a great many years, we were involved in farming, livestock production, custom machine hire, as well as home construction and other partnerships briefly, and each of these had to be accounted for, the preparation of the necessary information for income tax returns was many times a lengthy task. I checked the statements, and paid bills, and occasionally found errors that, when corrected, kept us from paying for something not received. Well kept records, too, have a way of revealing the actual worth of a project as to profit or loss.

The summer of 1969 my husband was working in Arkansas as harvest time approached, and so it was necessary for our son to run the combine. He had operated it many times under his father's supervision, but now he was to start without dad. A fellow talked him into pulling into a field of wheat that was too green, causing the combine to choke up and break down. This caused him and I to make a 40 mile trip to Enid for repairs, but the combine was soon back in operation. My husband came home in time to finish harvest but in the meantime, I'd gained a little more experience in helping to keep the harvest operation running smoothly.

Many times I drove the pickup with the combine as it was being moved from our home to a field or from one field to another. The custom harvesting that my late husband did included maize, wheat, oats, barley, rye, soybeans, wheat grass seed, and corn harvesting, as he operated the first corn picking attachment that was used on a combine in the state. I drove the pickup with him as he moved the combine from Stillwater to Fairfax and back for corn harvest. I hauled grain from the combine to the elevator for many years and the last harvest that we made locally I hauled all the grain that we harvested. I also helped by going to the implement company occasionally for repairs.

For a few years we had alfalfa on our farm and in haying time I'd drive the pickup as the hay was loaded.

I've helped a great deal with the cattle. When you raise cattle they need to be sprayed for lice, dusted for grubs, given injections for blackleg, etc., dewormed, branded, dehorned, and some castrated. We have had to treat cattle for pinkeye, foot rot, screw worms, pneumonia. and scours, among other ailments. They have to be sorted and loaded at market time. In later years, after we quit keeping our own bull, the cows had to be penned for artificial insemination. In all these tasks I helped in driving the cattle into the lots, sorting and working gates, helping to crowd them into the squeeze chutes, carrying the branding iron, the medication, and sometimes to help hold one down that he had roped and was working.

In May, 1961 a judgment was rendered against us in a damage suit. We put a second mortgage on our farm and paid this judgment of $13,062.25 on June 30, 1961. This made a drastic change in our financial status and I decided to work parttime off the farm in 19[illegible] worked as an Ayon representative for 7 years. Since I had some choice in planning the hours that I worked this was quite satisfactory and the added income helped a great deal. I worked, also. for a couple of years as the livestock cashier at a local

auction. I have also worked on the precinct election board several times.

In looking back over—just 10 months less than 40 years that my late husband and I spent in working together to accumulate property, land, and our home, I recall many long hours of hard work that we both did. Some of these were together but many times he was away from the farm and I was at home—caring for livestock or doing whatever I could to best fulfill my duties as a farm wife. I was aware of our obligations and kept myself informed on current markets. It became a joke that many times I was successful at guessing rather close to the net amount of our livestock sales. I'm sure that part of this was luck but I was very much interested too.

I maintain that I have made a very real contribution by helping to plant bermuda sod on terraces and pond dams by hand, by driving the tractor at harvest time, by driving the pickup to haul grain and hay, by helping to care for livestock, in keeping all the records, with my production of vegetables and poultry, with my care of flowers, shrubs. and trees, and with my skills in home management.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Dortha E. Leigh
DORTHA E. LEIGH

SUBSCRIBED AND SWORN to before me this 12th day of June, 1974.

/s/ Carol Lee Fiedler
NOTARY PUBLIC

MY COMMISSION EXPIRES:
October 6, 1976

Supreme Court, U. S.
FILED
SEP 8 - 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-61

DORTHA LEIGH, Widow and Surviving
Joint Tenant of J. W. Leigh,
Appellant,

VERSUS

OKLAHOMA TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

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Oklahoma Tax Commission

September, 1977

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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OKLAHOMA TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Oklahoma on the grounds that the case does not present a substantial federal question; that the judgment rests on an adequate non-federal basis; that the case is not important; and that the decision below is so obviously correct as to warrant no further review.

I.

THE STATE STATUTE INVOLVED AND THE PROCEEDINGS BELOW

A. The Statute

This appeal raises the question of the validity of the application, administration and enforcement of Title 68 O.S. Supp. 1973, Section 807(A)(4). This statute provides that the gross estate of the decedent includes any property owned by the decedent and any other person as joint tenants. It further provides that a surviving spouse or joint tenant claiming to own an interest with the decedent in any property included in the taxable estate of the decedent must support said claim by adequate proof, showing the value of claimant's interest contributed in money or money's worth from separate funds or properties. Also, the surviving spouse or joint tenant must provide a sworn affidavit setting forth the facts supporting the claim. The statute provides that this affidavit is considered prima facie evidence of adequate proof.

B. The Proceedings Below

Appellant, the widow and surviving joint tenant, filed an Oklahoma Estate Tax Return as executrix of her husband, J. W. Leigh's estate. The bulk of the estate was a 160-acre tract of land that was held in joint tenancy by the husband and wife. A sworn affidavit was attached to the return setting forth the history of Appellant's marriage to the deceased. The affidavit described all of the wife's duties during the marriage. Appellant claimed contribution in money or money's worth from separate funds or properties

of one-half (½) the value of the estate. Appellant submitted the affidavit as proof.

The Oklahoma Tax Commission denied the exclusion of one-half the value of the property as a contribution from the surviving spouse. Appellant was allowed an exclusion from the estate as her contribution equal to the amount of earnings acquired separately.

The Tax Commission issued an order assessing a tax based on the value of estate less the separate earnings the wife contributed. Appellant protested the assessment. The Commission denied Appellant's claimed contribution. Appellant paid the assessment under protest and filed an appeal to the Supreme Court of the State of Oklahoma. Appellant contended that her sworn affidavit was adequate proof of her contribution of one-half (½); that the Oklahoma Tax Commission discriminated against the Appellant on the basis of sex by requiring proof of her contribution and not requiring proof by husband; that proof of the policy of the Tax Commission is evidenced by the Attorney General's Opinion (Appendix E to Appellant's "Statement as to Jurisdiction"); that by the order issued in this case, the Oklahoma Tax Commission continued to adhere to its policy of presuming that when the husband died, all jointly owned property was to be included in his estate, but that when the wife died, there was not any such presumption; and that the order violated her constitutional rights and deprived her of the money paid under protest without due process of law. The Supreme Court of Oklahoma affirmed the Oklahoma Tax Commission's order (Appendix C to Appellant's "Statement as to Jurisdiction").

II.

ARGUMENT

A. The Case Presents No Substantial Federal Question Necessary to Support Jurisdiction

Not every case arising under federal law is within federal question jurisdiction. The federal claim must be a "substantial" one. *Baker* v. *Carr*, 369 U.S. 186. The right of substantiality refers to whether there is any legal substance to the position plaintiff is presenting, *Expert Electric, Inc.* v. *Levine*, 399 F.Supp. 893. Appellant has alleged the discriminatory enforcement of the questioned statute denies her equal protection of the law. Facts supporting different treatment of persons of the same class under like or similar conditions were not submitted into evidence. Even so, it is not enough to show that a law has not been enforced against other persons as it is sought to be enforced against the person claiming discrimination, *Mackay Telegraph & Cable Co.* v. *City of Little Rock*, 250 U.S. 94. To establish arbitrary discrimination inimical to constitutional equality, there must be something more, something which, in effect, amounts to an intentional violation of the essential principle of practical uniformity, *Mackay Telegraph & Cable Co.* v. *City of Little Rock*, 250 U.S. 94. Appellant offered an Attorney General's opinion to support her presumption of Appellee's policy in administering the statute. The opinion only requires the Oklahoma Tax Commission to consider that contribution of money's worth may be established by a spouse working in a family business or farm operation. Appellee considered Appellant's affidavit and found it insufficient to establish the contribution. Appellant has not

shown an intentional violation of the essential principle of practical uniformity sufficient to constitute discriminatory application, and no substantial federal question exists.

B. The Judgment Rests on an Adequate Non-Federal Basis

The questioned statute levies a tax on the gross estate of a decedent and includes within that gross estate any property held by a person in joint tenancy with another where the surviving joint tenant is unable to show contribution in money or money's worth from separate funds or properties. This statute required *any* surviving spouse to show a contribution, ascertainable in monetary figures, of separate property or funds used in the purchase of the joint tenancy property.

The Estate & Gift Tax Division of the Oklahoma Tax Commission has required more than a mere allegation that contribution was furnished by the surviving spouse. It inquired into the source and origin of the contribution. The surviving spouse was credited only with that portion of the contribution she furnished which was shown not to be attributable to money or money's worth acquired by her from the decedent. Appellant offered a sworn affidavit (Appendix F to Appellant's "Statement as to Jurisdiction"), outlining the history of her marriage to decedent, as evidence of her contribution in money's worth from separate funds.

The statute in question further provides that a sworn affidavit setting forth the facts supporting a contribution claim shall be considered prima facie evidence of adequate proof. "Prima facie evidence" means evidence which, if

credited, is sufficient to establish the fact or facts which it is adduced to prove, *State* v. *Sivin*, 225 A.2d 846.

The Supreme Court of the State of Oklahoma, affirming the order of the Oklahoma Tax Commission, stated that it agreed to the facts contained in the affidavit, but the facts contained in the affidavit, other than those reflecting the survivor's contribution of money, do not meet the conditions for exclusion from the estate part of the joint tenancy. Thus, this Court based its decision on the inadequacy of the affidavit and not upon any constitutional issues.

Where the decision of the state court is deemed to rest upon a non-federal ground which independently and adequately supports the state court judgment, the Supreme Court will not exercise jurisdiction to review, notwithstanding the raising of federal questions upon the state court record or the decision of the questions by the state court, *Berea College* v. *Commonwealth of Kentucky*, 211 U.S. 45. If the state court judgment is based upon a non-federal ground, it becomes necessary to inquire whether that ground is "adequate" to support the judgment without consideration of the federal question. In order to defeat review, the non-federal ground must be "sufficiently broad to maintain the judgment" without reference to the federal question, and must not be "so intermingled with that of federal right that the former cannot be considered as an independent matter." *State Tax Commission of Utah* v. *Van Cott*, 306 U.S. 511. Further the non-federal ground must be shown to be tenable, *Rogers* v. *Alabama*, 192 U.S. 226. A tenable ground must have substantial support. The state court decision was based on the inadequacy of the affidavit

as support for the contribution and can be considered an independent matter. Thus, the judgment rests on an adequate non-federal basis.

C. The Case Is Not Important

The statute in question was repealed by the First Regular Session of the 35th Legislature, 1975, codified as Title 68 O.S. Supp. 1975, Section 807(B)(1). The new law makes joint property passing between spouses exempt from Oklahoma estate tax, regardless of whether the surviving spouse made a contribution to its acquisition. Passage of this new statute satisfies all the principles contended for by Appellant.

In such circumstances, the attack on the prior statute is moot. *Allee* v. *Medrano*, 416 U.S. 802. The new statute cures any allegation of discriminatory administration and this case is not sufficiently important to warrant federal jurisdiction.

D. The Decision Below Is So Obviously Correct as to Warrant No Further Review

There is no question as to the validity of the statute. The only question relates to the administration of the statute. The only evidence submitted in support of Appellant's allegation of discriminatory application was the Attorney General's opinion (Appendix E to Appellant's "Statement as to Jurisdiction"). One of the duties of the Attorney General is to render advisory opinions to state officials, 74 Okl. § 18. It is the duty of public officials to follow the advice of the Attorney General when well-founded doubt or un-

certainty exists concerning the construction to be placed upon a statute. *Standard Surety and Casualty Co.* v. *State of Oklahoma*, 145 F.2d 605 (1944).

Evidence was not submitted showing a policy of the Tax Commission contrary to the Attorney General's opinion. The opinion was an advisory one and cannot be substituted as evidence of the fact that the Oklahoma Tax Commission was administering the statute in a discriminatory manner.

The decision of the Supreme Court of the State of Oklahoma was based upon the requirements of the affidavit. Since evidence supporting Appellant's discrimination argument was not submitted, the Court had no choice but to decide the issue of allowing or not allowing the contribution of the spouse on the adequacy of Appellant's affidavit.

The decision of the Supreme Court of the State of Oklahoma is correct and doesn't warrant further review.

CONCLUSION

Wherefore, Appellee respectfully submits that the case presents no substantial federal question necessary to support jurisdiction; that the judgment rests on an adequate non-federal basis; that the case is not important; and that the decision is so obviously correct as to warrant no further review, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judg-

ment entered in the cause by the Supreme Court of the State of Oklahoma.

Respectfully submitted,

MARJORIE PATMON
General Counsel

CLYDE E. FOSDYKE
Attorney

2501 Lincoln Boulevard
Oklahoma City, Oklahoma 73194

Counsel for Appellee,
Oklahoma Tax Commission

September, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 1977, three copies of Appellee's Motion to Dismiss or Affirm were mailed, postage prepaid, to Mr. Clee Fitzgerald, Fitzgerald, Houston & Worthington, P. O. Box 2, Stillwater, Oklahoma 74074, Attorneys for the Appellant. I further certify that all parties required to be served have been served.

Marjorie Patmon, General Counsel
Oklahoma Tax Commission
2501 Lincoln Boulevard
Oklahoma City, Oklahoma 73194
Counsel for Appellee

Supreme Court, U. S.
FILED
SEP 26 1977
JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-61

DORTHA LEIGH, Widow and Surviving
Joint Tenant of J. W. Leigh,
Appellant,

VERSUS

OKLAHOMA TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF OKLAHOMA

RESPONSE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

FITZGERALD, HOUSTON & WORTHINGTON
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September, 1977

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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TABLE OF AUTHORITIES

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RESPONSE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

The Appellant, Dortha Leigh, in response to the Appellee's said Motion to Dismiss or Affirm, responds thereto by argument and authority under the same headings used by the Appellee. Since the Appellee does not challenge any authority set out in Appellant's Jurisdictional Statement, the Appellant considers that those cited United States Supreme Court opinions do have a bearing upon this appeal, and no further authorities will be submitted other than the United States Supreme Court case(s) on prima facie evidence to straighten out the Appellee's citation of an Atlantic Reporter case as hereinafter set out.

I.
RESPONSE TO "THE STATE STATUTE INVOLVED AND THE PROCEEDINGS BELOW"

A. Response to "The Statute"

The statute says what it says. The Appellee's recitation verifies the Appellant's position. But, nothing is said to refute Appellant's contention that the Oklahoma Tax Commission's policy required proof of the contribution to the estate by a surviving wife spouse and did not require such proof by the surviving husband spouse.

B. Response to "The Proceedings Below"

Nothing here to respond to.

II.
RESPONSE TO "ARGUMENT"

A. Response to "The Case Presents No Substantial Federal Questions Necessary to Support Jurisdiction"

Appellant's response is that the recitation in Appellee's Motion to Dismiss or Affirm glides over the "fact" statement in the Attorney General's Opinion (Appendix "A" to Appellant's Statement as to Jurisdiction") that the Oklahoma Tax Commission's policy that all jointly owned property was included in the estate when the husband died, but that when the wife died none was included in his estate. At no place in the Motion to Dismiss or Affirm, nor in any pleading herein, has the Oklahoma Tax Commission stated that no such policy existed, and every judge, lawyer, and accountant in the state knows that such policy did exist and was a fact of life as to estate tax in Oklahoma.

The authorities cited by Appellee do not touch top, side, or bottom the opinions of the United States Supreme Court bearing upon the SUBSTANTIAL FEDERAL QUESTIONS raised in Appellant's Jurisdictional Statement—pertaining to the unconstitutional application of a constitutional statute by discriminating between males and females.

B. Response to "The Judgment Rests on an Adequate Non-Federal Basis"

See response to II. A. above, still no denial of the Oklahoma Tax Commission policy as alleged by Appellant.

Appellant does not need to cite the United States Supreme Court an Atlantic Reporter case to define "prima facie evidence" as used in the Oklahoma statute. Appellant refers the United States Supreme Court to its own cases.

Prima facie evidence of a fact, says Mr. Justice Story, is such evidence as, in the judgment of the law, is sufficient to establish the fact, and if not rebutted, remains sufficient for that purpose.—*Crane* v. *Morris*, N.Y., 31 U.S. 598, 6 Pet. 598, 611, 8 L.Ed. 514, cited in *Lilienthal's Tobacco* v. *U. S.*, N.Y., 97 U.S. 268, 24 L.Ed. 901; *State* v. *Roten*, 86 N.C. 701, 703; *U. S.* v. *Wiggins*, Fla., 39 U.S. 334, 347, 14 Pet. 334, 347, 10 L.Ed. 481; *Blough* v. *Parry*, 43 N.E. 560, 564, 144 Ind. 463; *Smith* v. *Burrus*, 16 S.W. 881, 106 Mo. 94, 100, 13 L.R.A. 59, 27 Am.St.Rep. 329.

Again, Appellant Dortha Leigh urges the United States Supreme Court to read her Affidavit (Appendix "F" to Jurisdictional Statement) and considering the fact that no evidence was offered contrary thereto, it just has to stand

as uncontested creditable evidence. BUT, Appellee misses the point—*it is uncontested that the Oklahoma Tax Commission's policy required such affidavit only from the surviving spouse if the surviving spouse was the wife.*

C. Response to "The Case Is Not Important"

The Appellee says that the law which the Appellee applied differently as to whether the surviving spouse was male or female is not *now* the law in Oklahoma. This is true.

But, the case *is important* to the Appellant, Dortha Leigh. The discriminatory application of the former Oklahoma estate tax statute has taken $3,814.91, with legal interest since November, 1975, from her just as surely as if it had been taken from her at gunpoint. $3,814.91 may not be important to the Appellee, Oklahoma Tax Commission, but Appellant assures the United States Supreme Court that it sure is to her.

D. Response to "The Decision Below Is So Obviously Correct As to Warrant No Further Review"

The only thing here deserving a response is the statement, "The only evidence submitted in support of Appellant's allegations of discriminatory application of the statute taxing the Appellant was the Attorney General's opinion (Appendix "E" to Appellant's Statement as to Jurisdiction)."

Well, that was the *only* such evidence. The Attorney General said the Oklahoma Tax Commission's policy required proof of contribution only when the surviving spouse was the wife. When the Appellee offered *no* evidence to the

contrary, why would the Appellant need to depose or subpoena fifty executors, lawyers or accountants from Payne County to testify otherwise?

CONCLUSION

The Appellant, Dortha Leigh, respectfully suggests to the United States Supreme Court that this case is important to her because she has been required to pay, under protest, $3,814.91 to the Appellee, Oklahoma Tax Commission, in violation of her rights under the Constitution of the United States as set out in her Jurisdictional Statement filed herein, and the Motion to Dismiss or Affirm does not point out to the highest court in this land how she has not correctly cited previous United States Supreme Court opinions that show that valid laws *must* be fairly applied regardless of sex, etc. Not one authority set out in Appellant, Dortha Leigh's Jurisdictional Statement is challenged in Appellee's, Oklahoma Tax Commission's, Motion to Dismiss or Affirm.

Respectfully submitted,

FITZGERALD, HOUSTON & WORTHINGTON
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Stillwater, Oklahoma 74074

Attorneys for Appellant

September, 1977

CERTIFICATE OF MAILING

I hereby certify that on this ____ day of _____, 1977, three copies of Response to Appellee's Motion to Dismiss or Affirm were mailed, postage prepaid, to Marjorie Patmon, General Counsel, Oklahoma Tax Commission, 2501 Lincoln Boulevard, Oklahoma City, Oklahoma 73194, and Mr. Clyde E. Fosdyke, 2501 Lincoln Boulevard, Oklahoma City, Oklahoma 73194, Counsel for Appellee, Oklahoma Tax Commission.

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